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In the Supreme Court of the United States

OCTOBER TERM, 1984

PURSUE ENERGY CORPORATION, ALMEADIE BERRY, CARL ERSKINE BERRY AND SHELBY JEAN BERRY,
Petitioners,

vs.

CLARENCE WILBERT BERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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QUESTIONS PRESENTED

Does a state statute which purports to change, retroactively and without limit, the laws of descent and distribution in order to create a claim of inheritance on behalf of illegitimates whose putative fathers died prior to the date of the statutory amendment, violate the federal constitutional rights of legitimate heirs and their subsequent grantees that prohibit taking of property without just compensation, deprivation of property without due process of law, and impairment of contracts?

PARTIES TO THE PROCEEDING BELOW

Petitioners and Appellees in *Berry v. Berry,* No. 54,942 in the Mississippi Supreme Court, were Pursue Energy Corporation, Almeadie Berry, Carl Erskine Berry and Shelby Jean Berry.

Respondent and Appellant was Clarence Wilbert Berry.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

OPINION BELOW

The Supreme Court of Mississippi on August 1, 1984, reversed and remanded a June 14, 1983 Final Judgment of the Chancery Court of Rankin County, Mississippi. See Appendix A at A1 for Opinion of Mississippi Supreme Court, reported at 463 So. 2d 1031 (Miss. 1984). See Appendix B at A6 for Final Judgment of the trial court. On February 27, 1985, the Mississippi Supreme Court, without opinion, denied a timely Petition for Rehearing *en banc*. See Appendix C at A7.

JURISDICTION

Following the State Supreme Court's February 27, 1985 denial of the Petition for Rehearing, a timely application for an extension of time to file this Petition by June 27, 1985, was granted by this Court on May 15, 1985.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

> No State shall make or enforce any law which shall . . . deprive any person of . . . property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

U.S. Const. art. I, § 10, cl. 1.

> (3) An illegitimate shall inherit from and through the illegitimate's natural father and his kindred . . . if:
>
> . . .
>
> (c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under Sections 91-1-27 and

> 91-1-29. However, no such claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less; and such time period shall run notwithstanding the minority of a child.
>
> . . .
>
> A remedy is hereby created in favor of all illegitimates having any claim existing prior to July 1, 1981, concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim . . . shall be brought within three (3) years from and after July 1, 1981 and such time period shall run notwithstanding the minority of a child.

Miss. Code Ann. § 91-1-15 (Supp. 1984).

STATEMENT OF THE CASE

Respondent claims to be the illegitimate son of Shelby Berry, who died intestate in 1958, leaving an estate consisting of approximately 160 acres of real property located in Rankin County, Mississippi. According to the Mississippi law of descent and distribution then in effect, an illegitimate was entitled to inherit from the natural father only under two conditions: (1) the father subsequently married the mother of the illegitimate child and acknowledged the child as his own;[1] or (2) the father

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1. Miss. Code Ann. § 474 (1942), *amended by* Miss. Code Ann. § 91-1-15 (Supp. 1984).

petitioned the chancery court to legitimate the child and to decree said child to be an heir of petitioner.[2]

Since Respondent failed to meet either of these criteria for inheritance, he was not deemed to be an heir at law of Shelby Berry under the Mississippi laws of descent and distribution in effect at the time of decedent's death. Title to the 160 acres of real property comprising Shelby Berry's estate thus descended in equal parts and became vested in his three heirs at law, as determined by the inheritance statutes then in effect: his widow, Almeadie Berry, and his legitimate cihldren, Shelby Jean Berry and Carl Erskine Berry, all of whom are Petitioners herein.[3]

In the twenty-seven years since the death of Shelby Berry, this property has been the subject of such numerous conveyances and assignments that ninety-seven persons now claim an interest in the property. Petitioner Pursue Energy Corporation claims its interest by virtue of oil, gas and mineral leases executed by the heirs at law of Shelby Berry and their subsequent grantees in favor of Pursue, dating from 1972 to 1977. Natural gas was discovered on the property in the late 1970's, with production on approximately 120 acres of the property commencing in 1980 and continuing through the present.

As previously noted, the Mississippi statutes governing descent and distribution in effect prior to 1981 did not allow an illegitimate to inherit from the putative father

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2. Miss Code Ann. § 1269-01 (1942), *amended by* Miss. Code Ann. § 93-17-1 (Supp. 1984).

3. *See* Miss. Code Ann. § 468 (1942) (current version at Miss. Code Ann. § 91-1-3 (1972) (real property to descend to children in equal shares); Miss. Code Ann. § 470 (1942) (current version at Miss. Code Ann. § 91-1-7 (1972) (widow to take child's share).

unless there had been an adjudication of paternity during the father's lifetime. It was not until 1981 that the Mississippi Legislature amended the illegitimacy inheritance scheme to recognize, for the first time, a claim of inheritance based upon an adjudication of paternity following the death of the putative father.

At issue in this lawsuit is the constitutionality of the savings clause of the amended statute, which provides that for "any claim existing prior to July 1, 1981 concerning the estate of an intestate whose death occurred prior to such date," an illegitimate would have a three-year period within which to bring an heirship proceeding to assert an inheritance claim. Miss. Code Ann. § 91-1-15 (Supp. 1984).

Pursuant to this savings clause, Respondent filed a petition in the Chancery Court of Rankin County, Mississippi, on October 14, 1982, seeking an adjudication that he be allowed to inherit from the estate of Shelby Berry. Petitioners filed answers in which they asserted a number of affirmative defenses, including federal constitutional challenges if the savings clause were interpreted in a manner such as to allow Respondent to maintain an inheritance claim which was first created some twenty-three years following the death of the intestate. By opinion dated June 14, 1983, the trial court entered a Final Judgment dismissing the action on statute of limitations grounds. An appeal to the Mississippi Supreme Court ensued.

As a separate and alternative ground for affirming the action of the trial court, Petitioners vigorously argued in the Mississippi Supreme Court that the savings clause, if interpreted such as to allow Respondent to maintain the inheritance claim, would violate Petitioners' rights under the contracts clause and the fifth and fourteenth amendments to the United States Constitution. In its decision

reversing the Chancellor's dismissal of the action, the Mississippi Supreme Court obviously rejected the constitutional challenges, holding that the savings clause "created a remedy in favor of all illegitimates regardless of the date of death of the intestate." See Appendix A at A3-A4.

Upon a timely Petition for Rehearing *en banc* filed by Petitioners, the Mississippi Supreme Court requested additional briefs from the parties. Once again, the issue of the constitutionality of the savings clause of Section 91-1-15 was the central issue addressed by both Respondent and Petitioners on rehearing. On February 27, 1985, the Mississippi Supreme Court, without opinion, denied the Petition for Rehearing, from which decision Petitioners seek review in this Court.

REASONS FOR GRANTING THE WRIT

In *Trimble v. Gordon,* 430 U.S. 762 (1977), this Court noted that a state's legislative scheme controlling the descent and distribution of property located within the state was a matter to be left to the discretion of the state legislature *unless* the scheme infringed upon the constitutional rights of the citizens of that state. 430 U.S. at 771. In this case, the Court is asked once again to invalidate, on federal constitutional grounds, a state statute governing the laws of descent and distribution. In this case, however, it is not the constitutional rights of illegitimates which have been violated by the statutory scheme, but rather the constitutional rights of legitimate heirs and their subsequent grantees.

In an overzealous attempt to enhance the inheritance rights of illegitimate citizens, the Mississippi Legislature has taken the unprecedented step of enacting a statute

which purports to change retroactively the laws of descent and distribution to create a right of inheritance which heretofore did not exist. In the instant case, as well as other cases decided by the Mississippi Supreme Court construing the statute, these inheritance claims have been applied retroactively, notwithstanding the number of years the estate had been closed and property rights vested in the heirs at law of the intestate as determined by the law then in effect. *See, e.g., Miller v. Miller,* No. 54,675 (Miss. Apr. 10, 1985); *Witt v. Mitchell,* 437 So. 2d 63 (Miss. 1983) (Robertson, J., concurring).

Respondent admits that such a retroactive enlargement of illegitimacy inheritance rights is not required by the equal protection clause of the United States Constitution. Petitioners submit that such an action is not *permitted* by the federal constitution, since the purpose and effect is to take vested property rights from one class of claimants and give those rights, or a portion thereof, to other claimants, an action which has been uniformly condemned by the jurisprudence of this country since time immemorial. As this Court stated in *Wilkinson v. Leland,* 27 U.S. (2 Pet.) 627 (1829):

> We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.

Id. at 657-58. Specifically, Petitioners contend that retroactive application of a statute creating inheritance rights that did not exist at the time of the intestate's death, and which operates to divest legitimate heirs and their sub-

sequent grantees of vested property rights, violates the constitutional provisions prohibiting taking of property without just compensation, deprivation of property without due process of law, and impairment of contracts.

The inheritance claim asserted by the Respondent in this case is by no means unique. Because of the limitless retroactive reach of the statute, and the expiration of the June 30, 1984, deadline to bring such actions, the trial courts of Mississippi have been flooded with claims by illegitimates seeking to inherit from estates which have been closed, and property rights emanating therefrom previously vested, for many years. If the Mississippi Supreme Court's decision in this case upholding the constitutionality of the statute is allowed to stand, a total or partial divestiture of property rights will result in this and numerous actions now pending.

While the decision of the Mississippi Supreme Court in this action, reversing and remanding the matter to the trial court for a trial on the merits, did not finally dispose of the litigation, Petitioners contend that the judgment in this case meets the requirement of finality under 28 U.S.C. § 1257(3), as that standard was articulated by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, the Court noted that it has recurringly accepted jurisdiction in cases in which the highest state court had finally determined the federal issues present in the matter, but in which further proceedings, including trials on the merits, were to follow in the lower state courts.

Petitioners submit that this action falls into that category of cases in which the Court must accept jurisdiction to avoid "the mischief of economic waste and of delayed justice." *Id.* at 478. If the savings clause of Section 91-1-15 cannot constitutionally be applied to the

estates of decedents who died prior to its enactment, then the long, complex and expensive litigation ahead in this case, as well as a host of other cases now pending in the Mississippi trial courts pursuant to the clause, will all be for naught. Furthermore, if Petitioners must await a trial on the merits and subsequent review by the Mississippi Supreme Court, several years will elapse before this matter is resolved, since the time for appellate review in the Mississippi Supreme Court now averages over two years. During the time the litigation is pending, claims by illegitimates constitute such a cloud upon the title of the legitimate heirs and their subsequent grantees that they cannot dispose of the affected property, or even make improvements on the property, for fear that their title will be divested. If the United States Constitution affords any protection to the real property rights of its citizens, it must be invoked immediately, in this case, to invalidate this arbitrary, capricious and retroactive exercise of divestiture attempted by the Mississippi Legislature.

I. UPON THE DEATH OF AN INTESTATE, THE REAL PROPERTY IMMEDIATELY DESCENDS AND BECOMES VESTED IN THE HEIRS AT LAW OF THE INTESTATE, ACCORDING TO THE LAWS THEN IN EFFECT.

The law is well settled, in Mississippi as well as in every other state, that upon the death of an intestate, his real property immediately descends and becomes vested in the heirs at law of the decedent, according to the laws then in effect. *See, e.g., Beach v. State,* 178 Miss. 336, 173 So. 429 (1937); *McPike v. Wells,* 54 Miss. 136 (1876). This rule was recognized by the United States Supreme Court in *Jefferson v. Fink,* 247 U.S. 288 (1918), where the Court held that rules of descent and distribution can be changed

prior to the death of the ancestor, which is the point at which property rights vest in the heirs at law of the decedent. 247 U.S. at 294.

Conversely, it has been recognized uniformly that any attempt to change the laws of descent and distribution retroactively is beyond the power of state legislatures. As one noted commentator on real property rights states:

> The descent of real estate is governed by the law in force at the time of death of the intestate; upon death of the intestate his estate immediately vests in those who by the laws which then exist are declared to be his heirs. It is beyond the power of the Legislature, should it make the attempt, to divest the title previously acquired by descent.
>
> . . .
>
> A statute enacted after the death of the intestate will not have the effect to take away the rights of heirs which become vested on such death.

5 Thompson on Real Property § 2405 (Grimes ed. 1979). Likewise, another commentator states:

> Upon the death of the owner intestate, the title to land interests vests at once in heirs as defined by the statutes of descents and distributions in effect at his death. It is thereafter beyond the province of the legislature to divest the rights of the heirs in part or in whole as by . . . conferring rights of inheritance upon adopted and illegitimate children and aliens.

J. Scurlock, Retroactive Legislation Affecting Interests in Land 122 (1953).

As a consequence of the overwhelming and uncontradicted authority condemning such legislation, it is not

surprising that research reveals only two instances in which state statutes changing inheritance rights were invested with retroactive effect. The first instance, *Muldrow v. Caldwell*, 173 S.C. 243, 175 S.E. 501 (1934), involved a 1934 amendment to the South Carolina laws governing descent and distribution which, for the first time, granted legitimate brothers and sisters of an illegitimate the right to inherit from and through the illegitimate. At issue in the case was the validity of a provision of the amendment which provided that the right of inheritance "shall be retroactive as to any estate not finally and completely settled" at the time the Act was approved by the Governor. 175 S.E. at 503.

Holding that the statute could not constitutionally be applied against the estate of an intestate who died three years prior to the date of the statutory amendment, the court relied upon the universally recognized rule that title to the decedent's real property descended and vested immediately in the heirs at law of the decedent at the time of his death. The court reasoned that any attempt to take property rights from the heirs, as determined by the statutes formerly in effect, and give those rights to others, would constitute both an unconstitutional taking, and a deprivation of property without due process of law. 175 S.E. at 504-06.

More recently, the New York courts have been confronted with the issue of retrospective application of a legislative amendment to the state's illegitimacy inheritance scheme which, like the Mississippi amended statute, provides, contrary to prior law, for inheritance based upon a determination of paternity following the death of the putative father. In *Estate of Smith*, 114 Misc. 2d 346, 451 N.Y.S.2d 546 (N.Y. Sur. Ct. 1982), the illegitimate, whose putative father died one year prior to the date of the

statutory amendment, argued that the amended statute was applicable to all estates that were pending at the time the amendment was enacted in 1981. Refusing to allow the illegitimate to maintain an inheritance claim, the court stated:

> On the date of death the statutory distributees receive a vested interest in the decedent's net estate which cannot be divested subsequently by legislative fiat without violating the constitutional prohibition of deprivation of private property without due process of law. This claim to a distributive share cannot by an act of the Legislature be confiscated, or be taken away and granted to another person, and although the law may be changed as to future cases, such a change cannot affect a right of succession already devolved. . . . Neither the Legislature nor this court has the power to divest the petitioner of fifty percent (50%) of her vested interest in the decedent's estate by giving retroactive effect to a statute dated effective one year after date of death . . . .

451 N.Y.S.2d at 548-49 (citations omitted); *see also Estate of Smith*, 118 Misc. 2d 165, 460 N.Y.S.2d 441 (N.Y. Sur. Ct. 1983) (recognizing constitutional infringements which would result from retroactive application of amended statute); *cf. Estate of Kenny*, 114 Misc. 2d 203, 450 N.Y.S.2d 1003 (N.Y. Sur. Ct. 1982) (giving amendment limited retroactive effect as to estate proceedings pending at time of enactment).

It should be noted that the attempted retroactive application of both the New York and South Carolina statutes was limited to estate proceedings pending at the time of the statutory amendment. By contrast, the Mississippi statute, as interpreted by the Mississippi Supreme Court, has an unlimited retroactive reach.

As this Court noted in *Cordova v. Folgueras y Rijos*, 227 U.S. 375 (1913), heirs have only such rights of inheritance as are given to them by the laws in force at the time of the intestate's death. *Id.* at 377. Since it is undisputed that Respondent had not been legitimated during the lifetime of his alleged putative father, he was not entitled to inherit from the estate of Shelby Berry according to the Mississippi laws governing descent and distribution in effect when the decedent died in 1958. *See, e.g., Stutts v. Estate of Stutts*, 194 So. 2d 229 (Miss. 1967) (illegitimate children who had not been legitimated prior to death of putative father not deemed to be heirs at law of father); *In re Powell's Will*, 239 Miss. 10, 121 So. 2d 1 (1960) (same).

These cases follow an unbroken line of Mississippi case law dating from 1843 when the Mississippi Supreme Court rejected the contention that illegitimate children were included within the meaning of the term "children" in the statute providing that an intestate's estate shall descend to his children in equal parts. In *Porter's Heirs v. Porter*, 5 Miss. (7 How.) 106 (1843), the Mississippi court, after a detailed analysis of illegitimacy inheritance rights, concluded that the term "children" included only legitimate children of the intestate. *Id.* at 111-12; *see also Akers v. Estate of Johnson*, 236 So. 2d 437, 440 (Miss. 1970); *Walker v. Matthews*, 191 Miss. 489, 3 So. 2d 820, 825 (1941).

At the time of Shelby Berry's death in 1958, there was no question about the constitutionality of statutes limiting the inheritance rights of illegitimates. Two landmark cases decided some ten years later, *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), heralded this Court's use of the equal protection clause of the fourteenth amendment to invalidate state legislative enactments that

discriminated on the basis of illegitimacy. However, neither of these cases dealt with state intestacy laws.

On the contrary, in the first case reaching the Court concerning the validity of descent and distribution statutes which treated illegitimates differently from legitimates, the Court upheld a Louisiana inheritance statute that allowed illegitimates to inherit only if no other heirs at law existed, and the property would otherwise escheat to the state. *Labine v. Vincent,* 401 U.S. 532 (1971).

It was not until this Court's decision in *Trimble v. Gordon,* 430 U.S. 762 (1977), that statutes governing illegitimacy inheritance rights were subjected to a heightened standard of review. In *Trimble,* this Court found that a statute which made marriage between the child's natural parents an absolute prerequisite to the illegitimate's right to inherit from the putative father violated the equal protection clause of the United States Constitution. However, one year later in *Lalli v. Lalli,* 439 U.S. 259 (1978), the Court upheld a New York statute which, like the Mississippi statute in effect at the date of death of Respondent's alleged putative father, required an adjudication of paternity prior to the death of the putative father as a precondition of an illegitimate's right to inherit.

While the constitutionality of Mississippi's illegitimacy inheritance scheme as it existed prior to 1981 has never been adjudicated by the Mississippi Supreme Court, two federal district courts have held the scheme to be constitutional under the reasoning of *Trimble* and *Lalli,* since illegitimates were allowed to inherit by means other than by the subsequent marriage of the natural parents. *See, e.g., Winterstein v. Spell,* No. J79-0560(C) (S.D. Miss. July 18, 1980); *United States v. 223.50 Acres of Land,* No. EC77-110-S-P (N.D. Miss. January 22, 1980).

Furthermore, even if the prior illegitimacy inheritance scheme were found to be unconstitutional under the reasoning of *Trimble*, every jurisdiction which has considered the issue has declined to apply *Trimble* retroactively to estates that were closed, and property rights finally vested, prior to the date of the decision. *See, e.g., Frakes v. Hunt*, 538 S.W.2d 497 (Ark. 1976), *cert. denied*, 444 U.S. 942 (1979); *Estate of Rudder v. Rudder*, 78 Ill. App. 3d 517, 397 N.E.2d 556 (1979); *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977); *Estate of Kidd v. Kidd*, 435 So. 2d 632 (Miss. 1983); *Wilson v. Jones*, 314 S.E.2d 341 (S.C. 1984); *Allen v. Harvey*, 568 S.W.2d 829 (Tenn. 1978); *Winn v. Lackey*, 618 S.W.2d 910 (Tex. Civ. App. 1981). Such refusals obviously stem from a recognition of the constitutional problems which would result from any attempt to effect a retroactive change in the laws governing descent and distribution.

II. A STATE STATUTE WHICH PURPORTS RETROACTIVELY TO CHANGE THE LAWS OF DESCENT AND DISTRIBUTION AFTER PROPERTY RIGHTS HAVE BECOME VESTED IN THE HEIRS AT LAW OF THE INTESTATE VIOLATES THE FEDERAL CONSTITUTIONAL PROVISION PROHIBITING TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

The takings clause of the fifth amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This amendment was among the earliest Bill of Rights guarantees incorporated into the due process clause of the fourteenth amendment, and thereby made applicable to the states. *See, e.g., Chicago, Burlington, & Quincy Railroad Co. v. Chicago*, 166

U.S. 226 (1897); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896).

The first level of analysis in cases arising under the takings clause involves a determination of whether the state action in question rises to the level of a "taking" within the meaning of the fifth amendment. In the instant case, there can be no question but that such a taking has occurred.

As is evident from the prior discussion, under the applicable Mississippi law governing descent and distribution in effect in 1958, the real property of Shelby Berry, Respondent's alleged putative father, immediately descended upon his death and vested equally in his widow and two legitimate children. Respondent now claims that he is entitled, by virtue of the savings clause of Section 91-1-15, to an equal share of the property owned by Shelby Berry at the time of his death. Such an action would have the result of reducing each legitimate heir's share in the estate from one-third to one-fourth.[4] Application of this figure to the 160 acres of real property owned by Shelby Berry at the date of death would divest *each* legitimate heir of title to approximately 13.3 acres of property. Likewise, the leasehold interest of Petitioner Pursue Energy Corporation, which is derived from the interests of the legitimate heirs, would be reduced by a like amount. Clearly, this constitutes a taking.

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4. In the instant lawsuit, Respondent in fact is seeking a one-half share in the estate, claiming that neither Almeadie Berry nor Carl Erskine Berry are heirs at law of the decedent. Respondent alleges that there was no marriage between Almeadie and Shelby Berry, and that Shelby Berry is not the father of Carl Erskine Berry. These unsubstantiated allegations are totally immaterial to the constitutional issues presented by this action, however, and accordingly will not be discussed.

The fact that a state action transfers property from a private individual to another private party, as opposed to transferring title to the government, does not remove the action from scrutiny under the takings clause. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The statute involved in the instant case is radically different from those statutes construed in the recent decisions of *United States v. Locke*, 105 S. Ct. 1785 (1985), and *Texaco v. Short*, 454 U.S. 516 (1982), where the Court sustained, against a takings clause challenge, the validity of statutes which extinguished the parties' mineral interests in real property. In *Locke*, a federal statute provided that mining claims would be forfeited unless the holder complied with yearly filing requirements; the state statute involved in *Texaco v. Short* required a mineral interest owner to take one of three affirmative steps (filing, production, or payment of taxes) within twenty years of acquiring the interest to prevent the mineral interest from reverting back to the surface owner.

In each of these cases, the Court rejected the argument that the statute effected a taking. Rather, the Court found that it was the failure of the mineral interest owner to take the affirmative step required by the statutory scheme, not the statute itself, which extinguished the property right. *Locke*, 105 S. Ct. at 1799; *Texaco v. Short*, 454 U.S. at 530.

By contrast, in the instant case it is the act of the Legislature itself which extinguishes the property rights of the legitimate heirs and their subsequent grantees, and there is no affirmative action parties in the position of Petitioners can take to prevent their title to a portion of

the property from being divested. Rather, all these parties can do is sit idly by and fervently hope that the illegitimate claimant fails in his burden of proving paternity. Once the illegitimate complies with the new legislative criteria established by Section 91-1-15 for heirship, however, which were totally absent from the statutory inheritance scheme effective at the time of the intestate's death, a taking occurs.

Once a taking has been effected, and it is shown that the taking is not accompanied by just compensation, the legislative enactment is invalidated as violating the takings clause. *See, e.g., Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Likewise, in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), the Court refused to apply a provision of the Bankruptcy Code in such a manner as would extinguish, retroactively, creditors' liens which had been created prior to the enactment of the Code, and expressed "substantial doubt" as to whether such an action could withstand scrutiny under the fifth amendment. *Id.* at 73-78; *see also Armstrong v. United States*, 364 U.S. 40 (1961); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

It is undisputed that the Mississippi Legislature, in amending the illegitimacy inheritance scheme to create a new right of inheritance which did not heretofore exist, made no provision to compensate legitimate heirs and their subsequent grantees whose property rights would be totally or partially divested by retroactive application of the amendment. Such a failure to provide compensation renders the scheme unconstitutional and void under the takings clause of the fifth amendment.

III. A STATE STATUTE WHICH PURPORTS TO CHANGE THE LAWS OF DESCENT AND DISTRIBUTION RETROACTIVELY AND AFTER PROPERTY RIGHTS HAVE BECOME VESTED IN THE HEIRS AT LAW OF THE INTESTATE VIOLATES THE FEDERAL CONSTITUTIONAL PROVISION PROHIBITING DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In a summation of the limitations imposed by the substantive due process clause of the fourteenth amendment, Professor Cooley, in his leading treatise on constitutional law, states:

> Neither . . . does the 'law of the land' or 'due process of law' mean anything which the Legislature may see fit to declare to be such; for there are certain fundamental rights which our system of jurisprudence has always recognized, which not even the Legislature can disregard in proceedings by which a person is deprived of life, liberty or property.

T. Cooley, A Treatise on the Constitutional Limitations 737-38 (8th ed. 1927).

The classic test for determining whether state legislation meets the requirements of substantive due process was articulated by the Court in *Lawton v. Steele*, 152 U.S. 133 (1894):

> To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 137; *see also Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594-95 (1962) (above quoted test "still valid today" in due process analysis).

In enacting Section 91-1-15, the Mississippi Legislature stated that its purpose was to treat legitimates and illegitimates equally, without classification. *See* preamble to Section 91-1-15. Petitioners do not deny that this is a worthy goal and do not question the validity of the Act as it operates prospectively. However, as the Court said in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976):

> It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively.
>
> The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Id. at 16-17.

Retrospective application of a statute enhancing illegitimacy inheritance rights, which has the correlative effect of divesting otherwise vested property rights of legitimate heirs and their subsequent grantees, cannot be said to be reasonably necessary to achieve the public purpose. Neither can it be said that such action is not oppressive upon individuals, since it is the legitimate heirs and their subsequent grantees who alone must pay the price to achieve this alleged "public" purpose.

As the Court stated in *Parham v. Hughes,* 441 U.S. 347 (1979), the fourteenth amendment commands equal treatment of illegitimate and legitimate children *when the action affects only the father of the illegitimate child. Id.* at 353; *see also Pickett v. Brown,* 462 U.S. 1 (1983) (striking down statute of limitations applicable only to

illegitimates in child support proceeding); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (same). Likewise, the decisions giving retroactive effect to the holding of *Trimble v. Gordon, supra,* in the limited context of entitlement to social security benefits by the illegitimate child of a deceased father are clearly justified, since the public as a whole shares in the cost of those benefits. *See, e.g., Gross v. Harris,* 664 F.2d 667 (8th Cir. 1981).

By contrast, in the case at bar, it is only the legitimate heirs and their subsequent grantees whose property rights are being confiscated merely for having the misfortune of claiming heirship through a father, deceased for over twenty-five years, who allegedly fathered an illegitimate child over fifty years ago. The fourteenth amendment does not permit such confiscation, much less compel it. If substantive due process is to retain any meaning, it must be invoked in this case to proscribe this arbitrary and unreasonable act of divestiture by the Mississippi Legislature.

IV. A STATE STATUTE WHICH PURPORTS TO CHANGE THE LAWS OF DESCENT AND DISTRIBUTION RETROACTIVELY AND AFTER PROPERTY RIGHTS HAVE BECOME VESTED IN THE HEIRS AT LAW OF THE INTESTATE VIOLATES THE CONSTITUTIONAL PROVISION PROHIBITING IMPAIRMENT OF CONTRACTS.

Article I, Section 10 of the United States Constitution provides that no state shall pass any laws impairing the obligation of contracts. In explaining the circumstances surrounding adoption of the provision, Justice Black, in his dissenting opinion in *City of El Paso v. Simmons,* 379 U.S. 497 (1965), stated:

> The Contract Clause was included in the same section of the Constitution which forbids States to pass bills of attainer or ex post facto laws. All three of these provisions reflect the strong belief of the Framers of the Constitution that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property. James Madison explained that the people were "weary of the fluctuating policy" of state legislatures and wanted it made clear that under the new Government men could safely rely on States to keep faith with those who justifiably relied on their promises.

379 U.S. at 522. While the courts have eschewed a literal interpretation of the clause so as to allow parties to set themselves outside the operation of a law simply by entering into a private contract concerning the subject matter of the law, the contract clause is not a "dead letter" and must be invoked in certain situations to invalidate state legislation which works a substantial impairment of parties' contractual obligations. *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977).

Analysis under the contracts clause thus begins with a determination of whether the state law in question has effected a "substantial impairment" of a contractual relationship. *Spannaus,* 438 U.S. at 244. In the instant case, it is clear that Section 91-1-15, by divesting the legitimate heirs of a portion of their real property interests, impairs every conveyance and contract which the legitimate heirs have entered into covering that interest. The impairment does not stop there, however, since Section 91-1-15 also

impairs the obligation of each conveyance or contract entered into by subsequent grantees of the legitimate heirs as well. As previously noted, through numerous contracts and conveyances, some 97 persons, including Petitioners, now claim an oil, gas, mineral or surface interest in the subject property. Certainly, Section 91-1-15 would effect an impairment of these parties' contractual relationships of the greatest proportion.

Once such a substantial impairment is found, the contracts clause requires the state legislation to be carefully scrutinized, with the contracting parties' reliance on prior law the major factor to be considered. As the Court stated in *Spannaus*:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

438 U.S. at 245.

Obviously the Petitioners in this action had a justified right to rely on the laws in effect at the time they received and/or conveyed their rights in the property descending from the estate of Shelby Berry since the prior law, without question, vested all incidents of ownership of the intestate's property in the legitimate heirs. Under no circumstances could Petitioners envision this unprecedented attempt by the Mississippi Legislature to change the laws of descent and distribution retroactively. Retroactive application of Section 91-1-15 transgresses flagrantly both the letter

and the spirit of the contracts clause. If the clause is not, as this Court said in *Spannaus*, a dead letter, it must be invoked to invalidate this action by the Mississippi Legislature.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Mississippi Supreme Court.

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioners certifies that true and correct copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi have this day been mailed by United States mail, postage prepaid, to the following:

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It is further certified that all parties required to be served have been served.

This the 26th day of June, 1985.

ALEX A. ALSTON, JR.

APPENDIX

APPENDIX "A"

WEDNESDAY, AUGUST 1, 1984, COURT SITTING

CLARENCE WILBERT BERRY)
)
#54,942 v)
)
ALMEADIE BERRY, SHELBY JEAN)
BERRY, CARL ERSKINE BERRY)
AND PURSUE ENERGY CORP.)

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Rankin County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order, adjudge and decree that the Decree of said Chancery Court rendered in this cause on the 14th day of June, 1983, be and the same is hereby Reversed and Remanded for trial on the merits. It is further ordered, adjudged and decreed that the appellees do pay all of the costs of this appeal to be taxed.

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Aug. 1, 1984

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,942

CLARENCE WILBERT BERRY

v.

ALMEADIE BERRY, SHELBY JEAN BERRY, CARL ERSKINE BERRY & PURSUE ENERGY CORPORATION

Before Roy Noble Lee, Robertson and Sullivan
Roy Noble Lee, Presiding Justice, for the Court:

Clarence Wilbert Berry filed suit October 14, 1982, in the Chancery Court, Rankin County, Mississippi, against Almeadie Berry, Shelby Jean Berry, Carl Erskine Berry and Pursue Energy Corporation, seeking an adjudication that he is the illegitimate son of Shelby Berry, and that he be allowed to share in the estate of Shelby Berry. From an order June 14, 1983, dismissing the bill of complaint, he appeals and assigns as error in the trial below, the following:

The lower court erred in rendition of its final judgment wherein the appellant's claim was adjudged barred by the general six-year statute of limitations.

Appellant was born June 18, 1934, in Rankin County, Mississippi. Shelby Berry died in 1958, leaving an estate consisting of one hundred sixty (160) acres of land. The appellees, except for Pursue Energy Corporation and Jerry T. Johnston, are heirs-at-law of the intestate Berry. During the twenty-five (25) years since the death of Shelby Berry, approximately eighty (80) persons claim they have acquired, and now own, oil, gas and mineral interests in the acreage. No action has been brought prior

to this suit for the purpose of establishing appellant's heirship, or his claim against the estate of Shelby Berry. In dismissing the bill of complaint, the lower court held that appellant's claim is barred by the general six-year statute of limitations. That court apparently relied upon *Knight v. Moore*, 396 So. 2d 31 (Miss. 1981). Appellee argues that the application of the law in *Estate of Kidd v. Kidd*, 435 So. 2d 632 (Miss. 1983), to the effect that the six-year statute begins to run at the death of the putative father, properly should be applied here. *Larsen v. Kimble*, 447 So. 2d 1278 (Miss. 1984), disposes of the question now before the Court, and it is not necessary to discuss *Knight v. Moore, supra; Estate of Miller v. Miller*, 409 So. 2d 715 (Miss. 1982), *Estate of Kidd v. Kidd, supra; Vance Witt, Successor-Administrator of the Estate of Mayes v. Mitchell*, 437 So. 2d 63 (Miss. 1983).

Mississippi Code Annotated Section 91-1-15 (1972), applying to illegitimates, was amended effective July 1, 1981. Pertinent part of the section which governs in this case follows:

> (ii) • • •
>
> Any claim existing prior to July 1, 1981, concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim by a natural father to inherit from or through an illegitimate child shall be brought within three (3) years from and after July 1, 1981, and such time period shall run notwithstanding the minority of a child.

In *Larsen*, this Court said:

> Perhaps the most significant aspect of this remedial statute is the fact that it created a remedy in favor of

all illegitimates regardless of the date of the death of the intestate but placed in a three year limitation period, after July 1, 1981, notwithstanding the minority of a child (illegitimate) within which to file such claim. This was done by inclusion of subsection (3)(d) (ii) 2 which states as follows:

> A remedy is *hereby created in favor of all illegitimates having any claim existing prior to July 1, 1981, concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim by a natural father to inherit from or through an illegitimate child shall be brought within three (3) years* from and after July 1, 1981, and such time period shall run notwithstanding the minority of a child.[1]

The question now arises how does this code section apply to the issues presented in the instant case. Earl Irene Stuart Kimble could not have asserted a claim against Earl B. Kimble prior to July 1, 1981. This is true for two reasons. First and foremost, throughout the life of Earl Irene Stuart Kimble, Earl B. Kimble was alive. Because no person is an heir of another living person, Earl Irene Stuart Kimble had no claim to assert.

* * *

. . . [T]he remedy created by § 91-1-15 did not come into existence until July 1, 1981. Therefore, no cause of action existed prior to July 1, 1981. At

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1. Amendment to Section 91-1-15 effective March 14, 1983.

> that point § 91-1-15 created a remedy for all illegitimates and descendants of illegitimates. Subsection (3) of this statute provides that: "The childen of illegitimates and their descendants shall inherit from and through their mother and father according to the statutes of descent and distribution." Therefore, the statute also created a cause of action for those descents of illegitimates who wished to assert a claim against their ancestor's estates. Such is just the case in the immediate suit. Although Earl Irene Stuart Kimble never had a cause of action, a remedy was created for the first time in favor of Darlene Larsen on July 1, 1981.
>
> * * *
>
> . . . The one year or ninety (90) day period of limitation is therefore applied only to those cases where the intestate died subsequent to July 1, 1981. In the instant case, Earl B. Kimble died prior to July 1, 1981. Because that is so, Darlene Larsen had until June 30, 1984 in which to assert her claim as an heir to the estate of Earl B. Kimble. Clearly then, this suit was timely filed. [447 So. 2d at 1281-82, 1283].

Following *Larsen v. Kimble, supra*, as we are bound to do, in our opinion the chancellor erred in dismissing the complaint. The judgment of the lower court is reversed and the cause is remanded for a trial on the merits.

REVERSED AND REMANDED.

WALKER, P.J., BOWLING, HAWKINS, DAN LEE, PRATHER, ROBERTSON, and SULLIVAN, JJ., CONCUR. PATTERSON, C.J., NOT PARTICIPATING.

APPENDIX "B"

IN THE
CHANCERY COURT OF RANKIN COUNTY,
MISSISSIPPI

CIVIL ACTION NO. 21,458

CLARENCE WILBERT BERRY
Plaintiff,

V.

ALMEADIE BERRY, SHELBY JEAN BERRY, CARL ERSKINE BERRY and PURSUE ENERGY CORPORATION
Defendants.

FINAL JUDGMENT

THIS MATTER came on for hearing on the Motion to Dismiss filed by each of the named Defendants and Jerry T. Johnston as Intervenor on the ground that the Complaint filed herein by the Plaintiff Clarence Wilbert Berry to determine right to inherit is barred by the applicable statute of limitation, and the Court being now fully advised in the premises, and after hearing arguments of counsel, and considering the extensive briefs filed herein finds that the Motions to Dismiss filed by all Defendants and the Intervenor are well taken and should be sustained since the action is barred by the six-year statute of limitations, and that the action must be dismissed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Complaint to Determine Right to Inherit should be, and the same is hereby, dismissed with prejudice at the cost of Plaintiff.

ORDERED, ADJUDGED AND DECREED this the 14th day of June, 1983.

Original Signed by
Billy G. Bridges
Chancellor

APPENDIX "C"

WEDNESDAY, FEBRUARY 27, 1985, COURT SITTING

CLARENCE WILBERT BERRY)
#54,942 v)
ALMEADIE BERRY, ET AL)

This cause this day came on to be heard on Petition of Mississippi Bankers Association for Leave to Appear as Amicus Curiae in Support of Petition for Rehearing and this Court having sufficiently examined and considered the same and being of the opinion that the same should be granted doth order that said Petition be and the same is hereby Granted. Motion for Leave to Intervene as Amicus Curiae on behalf of Shell Oil Co. is Sustained; Petition for Rehearing is Denied.

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